No. 82-1302

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SEA-LAND SERVICE, INC.,

Petitioner,

—against—

CARL O. AKERMANIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF SEA-LAND SERVICE, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY BRIEF OF SEA-LAND SERVICE, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTRODUCTION

By its decision in this case, the Second Circuit Court of Appeals ignored the reach of this Court's decision in *Donovan* v. *Penn Shipping Co., Inc.*, 429 U.S. 648 (1977) and unconstitutionally expanded the role of an appeals court (and diminished that of district courts) in determining when a new trial should be granted. Respondent's brief in opposition to the Petition for Writ of Certiorari utterly fails to confront these issues, and instead offers a most strained "logical" argument which is unsuccessful even on its own narrow terms. This approach seems the product of respondent's less than wholehearted endorsement of the court of appeals' reasoning, which is demonstrated by the lengthy justification of the result in the court below ". . . even without a finding that [the Court of Appeals] had jurisdiction to consider the cross-appeal" (Respondent's Br., pp. 9-15).

ARGUMENT

I

Respondent first argues perfunctorily that the court of appeals correctly determined that it had jurisdiction to consider the cross-appeal notwithstanding respondent's consent to the remittitur because: (1) the district court had no authority to offer the remittitur and (2) respondent attacked on its cross-appeal not the remittitur but the order conditionally granting a new trial (Respondent's Br., p. 7). In both of these circum-

stances, according to respondent, the *Donovan* "rule" does not apply. (*id.*)

This argument cannot withstand scrutiny. If respondent is correct in asserting that a plaintiff who has consented to a remittitur in lieu of a new trial may nonetheless appeal or cross-appeal whenever the court "lacks authority" to utilize this device, then *every* plaintiff who has so consented may seek immediate appellate relief. The use of remittitur in lieu of a new trial is, after all, an exercise of the trial court's discretion. *Moore's Federal Practice*, 2d Ed., V. 6A, § 59.08[6] at p. 59—158. If a plaintiff believes that he should not have been required to accept a lesser verdict, his appeal from such an order is necessarily based on the trial court's abuse of discretion. There is no meaningful distinction to be drawn between the usual situation where abuse of discretion is claimed in connection with a remittitur to reduce the damages award and the situation presented here: in the former, the trial court will be said to have exceeded its authority (if plaintiff prevails on appeal) just as the court of appeals determined that Judge Haight acted without authority. Under the "logic" of respondent's argument, any plaintiff who has consented to a remittitur which was beyond the power of the court to grant because of abuse of discretion should be entitled to claim that he should not be bound by his consent to an "illegal" order. Thus, respondent's argument means nothing less than the complete vitiation of this Court's decision in *Donovan* v. *Penn Shipping Co., Inc., supra*: for the *Donovan* "rule" will always be said "not to apply."

Respondent's alternative position—that *Donovan* only prohibits a consenting plaintiff from attacking a remittitur (as opposed to the order for a new trial which acceptance of the remittitur will avoid) *and* that respondent only appealed from the latter [Respondent's Br., p. 7]—is simply disingenuous. Apart from the fact that respondent, earlier in his brief, concedes that "[b]oth the Petitioner and the Respondent argued to the court of appeals that the remittitur was improper"

[Respondent's Br., p. 2], it is obvious that respondent was appealing from *both* the remittitur and the new trial orders.[1]

It is equally clear that in many cases a defendant will appeal after a plaintiff has consented to a remittitur in lieu of a new trial on the ground that remittitur could not correct the jury's error and that only a new trial was appropriate. If respondent means to imply that where the remittitur is first attacked by the main appeal, a consenting plaintiff can cross-appeal from the conditional grant of a new trial without violating *Donovan*, respondent is in effect arguing that *Donovan* does not apply to cross-appeals. Such argument is untenable since this Court's *per curiam* opinion in *Donovan, supra* cited two earlier authorities which specifically barred cross-appeals by persons who had accepted remittiturs to avoid retrial. *Mattox* v. *News Syndicate Co.*, 176 F.2d 897, 904 (2d Cir.), *cert. den.* 338 U.S. 858 (1949); *Woodworth* v. *Chesbrough*, 244 U.S. 79 (1917) cited in *Donovan* v. *Penn Shipping Co., Inc.*, 429 U.S. at 649.

II

A significant portion of respondent's brief is spent justifying the result reached by the court of appeals but disavowing the reasoning underlying that court's decision—principally, its determination that it did have jurisdiction to entertain respondent's cross-appeal [Respondent's Br., pp. 9-15]. Respondent's argument is framed at p. 6 of the brief as follows:

> "It is the Respondent's position that once the court of appeals reversed the district court's order [sic], the order

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1 Respondent argued on appeal that the 4% contributory negligence figure found by the jury was correct. Respondent therefore disagreed with the decision by the district court (a) to order a new trial because it believed the jury had seriously erred on that issue and (b) to condition the new trial upon respondent's acceptance of a remittitur equal to an increase in the amount of contributory negligence to 25%. Petitioner, on the other hand, agreed with the district court that the jury had erred and questioned *only* the remedy it fashioned to correct that error (i.e. remittitur, limited new trial on liability issues only).

> conditionally granting a new trial had no continuing life, vitality or effect. The only alternative left to the court of appeals, whether it considered the Respondent's cross-appeal or not, was to remand the entire case to the district court to consider the outstanding motion for a new trial."

Not surprisingly, respondent does not refer to any authority in support of this singular analysis. Certainly, the court of appeals concluded that the order conditionally granting a new trial, contained in Judge Haight's Memorandum Opinion and Order dated October 14, 1981 [App. C], survived the reversal of the Judgment on a Reduced Verdict [App. E], as demonstrated by the court's statement that with the remittitur excised, what it ". . .face[d] . . . [was] whether a cross-appeal will lie as to a non-final order for a new trial . . ." [App. A-8]. Moreover, Rule 50(c) F.R.Civ.P., which requires a trial judge to conditionally rule on a motion for a new trial if the court grants a motion for judgment n.o.v., would make no sense unless the conditional order survived the reversal of the judgment on appeal.

On a more fundamental level, respondent's argument misconstrues entirely the meaning of an order granting a new trial. Such an order can—and must be—entered if the trial judge, in exercise of his mature discretion, is convinced that the jury has reached "a seriously erroneous result." *Moore's Federal Practice,* 2d Ed., V. 6A § 59.08 [5] at p. 59-160; 161 (1973). Once the court has so concluded—as did Judge Haight in his October 14, 1981 opinion [App. C-9,10]—a new trial must be granted. The district courts may condition the grant of a new trial on plaintiff's acceptance of a remittitur; but the availability of remittitur cannot affect the decision to grant a new trial once the trial judge has concluded that the jury has seriously erred. It follows, then, that reversal of a judgment based on a plaintiff's consent to a remittitur cannot affect the underlying order for a new trial except to render it unconditional. Respondent's argument that ". . . it was incumbent upon [the court of appeals] to remand the entire case to the district court in order to allow the district court to consider . . . whether it

believed that an unconditional new trial order was appropriate" [Respondent's Br., p. 14] erroneously assumes that the trial court, believing the jury had seriously erred, could nevertheless *decline* to order a new trial because remittitur was no longer available.

Respondent further suggests that the court of appeals could have considered the new trial order "even in the absence of a cross-appeal" because, according to respondent, "[t]he requirement of a cross-appeal is a rule of practice and not a rule of jurisdiction. (Authorities omitted)." [Respondent's Br., p. 13]. For the purposes of this argument, of course, respondent inconsistently assumes that the new trial order *did* survive the excision of the remittitur.

Unfortunately, respondent has misread the authorities upon which he purports to rely. The circumstances in which a cross-appeal may be dispensed with are strictly limited to where an appellee "urge[s] in *support* of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court, or an insistence upon matter overlooked or ignored by it." (Emphasis supplied) *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435 (1923). Respondent's position in the court of appeals was *not* in support of the district court's decree; respondent was attacking the latter's decision in effort to reinstate the jury's verdict. In such circumstances, the absence of a cross-appeal is fatal: ". . . the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below." *Id.*

But respondent's argument fails for reasons more important than respondent's error as to when a cross-appeal need be filed. The argument assumes that the court of appeals was empowered to consider, *sua sponte*, an issue which respondent was himself barred from raising; and that, in effect, respondent's consent to the remittitur would for reasons unexplained preclude respondent, but not the court, from questioning the

validity of the new trial order. The uncertainty and arbitrariness which would result from acceptance of this position is manifest: a defendant could never rely on *Donovan* if the court of appeals could itself raise the very issue which *Donovan* forbids to a consenting plaintiff.

Respondent draws comfort from the fact that the court of appeals "did not specifically rule on the cross-appeal" [Respondent's Br., p. 13] and implies that as a result, any error by the court in determining that it had jurisdiction to consider the cross-appeal is of no consequence. Indeed, respondent goes so far as to suggest that petitioner was "fortunate" because the court of appeals could itself have reinstated the jury verdict as did the court in *Ferguson* v. *Chester A. Poling, Inc.*, 285 N.Y.S. 340, 247 A.D. 727 (2d Dept. 1936) [*Id.*, p. 14].

Had the court of appeals determined that Judge Haight abused his discretion or committed legal error in ordering a new trial, respondent's argument would have merit. The Appellate Division in *Ferguson* v. *Chester A. Poling, Inc., supra* reversed on precisely those grounds, holding that the damages awarded by the jury were not excessive as a matter of law and that the trial judge's determination of the jury's view of the contributory negligence issue was "sheer conjecture." [*id.*] In the instant case, however, the court of appeals held that if the jury concluded that respondent exercised poor judgment by agreeing to work at the particular time he did, the trial court judge was acting "within his broad discretion in ruling that a finding of only four percent contributory negligence was against the weight of the evidence and that a new trial should be granted" [App. A-9] Nor did the court even remotely suggest that the trial judge had erred on a matter of law, but, rather, specifically approved the latter's formulation of comparative fault under the Jones Act [*id.*, n. 2].

In the absence of abuse of discretion or error of law by the trial court, a federal appeals court may not reverse a new trial order ". . . simply because [the trial judge] exercised [his discretion] in one way rather than the other." *Compton* v. *Luckenbach Overseas Corporation*, 425 F.2d 1130, 1133 (2d

Cir. 1970). Error by the trial judge on a matter of fact, as opposed to law, in setting aside a jury verdict is simply not reviewable. *Portman* v. *American Home Products Corp.*, 201 F.2d 847, 848 (2d Cir. 1953).

Respondent's brief does not challenge the foregoing authorities; it simply ignores them. It similarly fails to confront the fact that had the appeals court "specifically ruled" on the new trial order, that order would have been *affirmed.* Instead, the court, having first erred in assuming jurisdiction over the cross-appeal, went on to compound its error by declining to exercise that jurisdiction in accordance with principles ". . . *too well established to justify discussion.*" *Portman* v. *American Home Products Corp., supra,* at 848 (emphasis added).

III

Respondent professes an inability to "understand" petitioner's argument that the court of appeals' decision violated the Seventh Amendment by re-examining the facts other "than according to the rules of the common law." [Respondent's Br., p. 15]. The Seventh Amendment was, of course, specifically mentioned by this Court in *Fairmount Glassworks* v. *Cub Fork Coal Co.*, 287 U.S. 474, 482 (1933) as one basis for the rule that the circuit courts of appeals may not reverse a trial judge's order granting or denying a new trial on the basis of factual error.

Whether characterized as a violation of the Seventh Amendment or as interference with the trial judge's discretion, the effort by the court of appeals to "focus the District Court's attention" [App. A-9] on purely factual matters concerning the new trial order was error that cannot be justified or overlooked on grounds of "economy" [Respondent's Br., p. 12]. There is no question that a district court is empowered to reconsider its decision granting a new trial at any time before an affirmance by the court of appeals. But it is the sheerest speculation to propose, as does respondent, that the trial court judge would have in any event done so in this case; *or* that he would have so

completely disavowed his earlier opinion in the absence of the direction and advice of the court of appeals.

Reversal of the decision of the court of appeals would be required even if Judge Haight's opinion of January 18, 1983 [App. F] did *not* reveal that the exercise of his discretion had been foreclosed by the appeals' court's opinion.[2] Advisory opinions by federal appeals courts which exceed the scope of appellate review must be reversed no matter how "independent" the resulting reconsideration by the trial court may appear. Any other disposition would compromise the ability of district courts to decide new trial motions based upon dictates of conscience *rather than* the likelihood of pleasing a particular panel of a court of appeals.

IV

If petitioner is correct in its conviction that the court of appeals has most seriously erred, that error should be rectified immediately so that a new trial may be had without further delay. No useful purpose would be served by requiring petitioner to await the outcome of its pending appeal in the Second Circuit Court of Appeals[3] before renewing its petition to this Court. With the exception of the issue of the district court's error of law or abuse of discretion upon reconsideration of the new trial motion, the issues petitioner will raise in the Second Circuit Court of Appeals are identical to those submitted to this Court in the Petition for Writ of Certiorari. Since the court of appeals has already declined to reconsider its opinion of September 14, 1982 [App. A] in denying the Petition for Rehearing [App. B], it is unlikely that it will do other than adhere to its original decision upon this appeal. It is also most likely that the appeals court will affirm the judgment entered

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2 This Court is respectfully referred to p. 23, n. 18 of the Petition for Writ of Certiorari.

3 Petitioner's brief will not be filed until May 6, 1983 and the appeal is not scheduled to be heard until June.

on Judge Haight's revised opinion of January 18, 1983 since the court will not be persuaded that it impaired or interfered with the trial court's exercise of discretion.

CONCLUSION

Petitioner prays that its Petition for Writ of Certiorari be granted and that the Court enter an order of summary disposition on the merits pursuant to S. Court Rule 23.1.

Dated: New York, New York
April 26, 1983

Respectfully submitted,

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